

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY STOUTMILES,

Defendant-Appellant.

UNPUBLISHED

May 25, 2001

No. 224370

Berrien Circuit Court

LC No. 99-401495-FH

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant was convicted by jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced him to 72 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it admitted evidence of a previous sexual act that defendant allegedly committed against a seven-year-old girl. We disagree. We review the admission of other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Williams*, 240 Mich App 316, 322; 614 NW2d 647 (2000).

Although evidence of other crimes, wrongs or acts is not admissible to prove a propensity to commit such acts, that evidence is admissible for other purposes, including to show a scheme, plan or system in doing an act. MRE 404(b)(1); *Crawford, supra*. Other acts evidence is admissible if it is introduced for a proper purpose; it is relevant; the danger of undue prejudice does not substantially outweigh the probative value of the evidence; and, upon request, the trial court may provide a limiting instruction to the jury. *Crawford, supra* at 385, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

Here, the evidence admitted meets each prong of the *VanderVliet* test. First, plaintiff introduced the evidence for a proper purpose. Testimony regarding prior criminal sexual conduct is admissible to show that the defendant had a scheme or plan to commit the crime. *People v Anderson*, 111 Mich App 671, 681; 314 NW2d 723 (1981). Because the evidence in the present case demonstrates a plan or scheme by defendant to commit the crime in his living room despite the presence of others, plaintiff introduced the evidence for a proper purpose. Moreover, we also find that plaintiff's introduction of the evidence to show that it was possible for defendant to

commit this crime in a room full of people was proper. In *People v Layher*, 238 Mich App 573, 584-585; 607 NW2d 91 (1999), lv gtd on other grounds 463 Mich 906(2000), we upheld the trial court's admission of the defendant's prior sexual assault against a complainant to show that the seemingly improbable circumstances of an alleged offense are not so improbable. In *Layher*, the bad acts evidence took place while family members were present in the apartment or sleeping in the same room, and was offered to rebut the defendant's theory that the complainant had fabricated the allegations when she testified that the defendant assaulted her while family members were nearby. *Id.* at 586. As in *Layher*, in the present case the victim alleged that the proscribed acts took place while others were sleeping in the same room; defendant's theory was to claim that the victim was fabricating these accusations; and the other acts evidence shows that defendant was willing to risk assaulting the victim while others were nearby.

Second, the evidence is relevant because it makes defendant's guilt more probable than it would be without that evidence. MRE 401. The evidence shows that because defendant has previously committed unlawful sexual acts in his crowded living room, it is not implausible for him to have performed similar acts on the complainant, despite the fact that various individuals were sleeping in the living room during the commission of the offense. See *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000) (“[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.”).

Further, the evidence's probative value was not substantially outweighed by the risk of unfair prejudice. Although the potential for prejudice existed, the evidence was probative in showing a plan, scheme or system that defendant may have used to sexually assault young girls and demonstrates that defendant would risk assaulting the complainant in a room where other people were sleeping. *Sabin, supra* at 71. Moreover, the trial court gave a limiting instruction to the jury regarding the proper use for that evidence. *Layher, supra*. Consequently, we conclude that the trial court did not abuse its discretion in admitting the other acts evidence at trial.

Next, defendant argues that he was denied effective assistance of counsel because his trial attorney failed to require a showing that a seven-year-old girl was legally competent to testify as a witness at trial. We disagree. Trial counsel's failure to have a critical witness declared incompetent to testify does not amount to ineffective assistance of counsel because witnesses are presumed competent to testify under MRE 601. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Further, the witness testified at trial that she could distinguish between telling the truth and a lie, which indicates that any request to establish her competency would not only have been unnecessary, but futile. See *id.* at 737-738. Defendant's claim of ineffective assistance of counsel is without merit.

Finally, defendant argues that the trial court abused its discretion when it imposed a sentence that deviated from the sentencing guidelines¹ and was disproportionate to the offense

¹ Because the offense occurred prior to January 1, 1999, the statutory guidelines are not applicable. MCL 769.34; MSA 28.1097(3.4); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

and offender. We disagree. We review sentencing decisions for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

The principle of proportionality requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636. “The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter.” *People v Castillo*, 230 Mich App 442, 447-448; 584 NW2d 606 (1998), citing *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A sentencing court may justify an upward departure by reference to factors considered within the guidelines, but adjudged inadequately weighed, and by introducing legitimate factors not considered by the guidelines. *Castillo*, *supra* at 448.

Here, defendant’s sentence does not violate the principle of proportionality. The record reveals that the trial court considered defendant’s prior criminal history; the allegations of sexual assault made against defendant involving a seven-year-old girl, recognizing that defendant was acquitted in that case, *People v Wiggins*, 151 Mich App 622, 625; 390 NW2d 740 (1986); the effect of the crime on the victim; the tender age of the victim; and the victim’s relationship with defendant and his family when defendant committed the crime. Considering these factors and concluding that the long-term effects on the young victim in this case are not adequately addressed in the sentencing guidelines, the trial court imposed a sentence exceeding the guidelines. On this record, we conclude that defendant’s sentence is proportionate to the offense and offender and therefore the trial court did not abuse its discretion.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage